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PRESUMPTIONS: PHENOMENA ON THE PERIPHERY*

ERNEST F. ROBERTS†

IN EXAMINING the law of evidence relative to the functions served by the device called "rebuttable presumption," two classes of cases constantly tantalize the analyst and irritate the purist. The first concerns those instances where courts which regularly pay homage at the altar of Thayer suddenly and inexplicably send the question whether a presumption has been rebutted to the trier of fact. The second involves those courts which insist that, while the presumption mechanism does not shift the risk of non-persuasion to the opponent, the question whether the presumption has been rebutted always and quite properly ought to be decided by the trier of fact. It is the purpose of this article to suggest that many instances of the first phenomenon can be entirely justified under classic doctrine properly understood; while the second phenomenon finds its historical roots, not in articulate policy pronouncements relative to the proper allocation of credibility-testing, but in a nineteenth century verbal misunderstanding.

I.

THE McDERMOTT COROLLARY.

A. *Introduction:*

For the past three score years the work of Professor James Bradley Thayer has been generally accepted as the classic exposition of the effect of a rebuttable presumption of law.¹ This doctrine holds that once the basic fact has been established in the action the presumed fact must be found to be true unless and until enough evidence contra the presumed fact has been introduced which would support a finding of the presumed fact's non-existence. It follows that two factors are distinctive about the classic presumption. First, the presumption serves

* This article is an addendum to Roberts, *An Introduction to the Study of Presumptions* (pts. 1-2), 4 VILL. L. REV. 1, 475 (1958-1959). The basic definitions upon which this article is premised may be found there.

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1. THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 313-389 (1898) (hereinafter cited as TREATISE).

only to fix the burden of going forward with the evidence contra the presumed fact, thereby relieving the party upon whom rests the risk of non-persuasion on the issue of the presumed fact of his duty to introduce relevant evidence of that fact in the first instance. Second, it is a question of law rather than of fact whether the requisite quantum of proof rebutting the presumed fact has been introduced.²

B. *Statement of the problem:*

The problem itself is simply stated: why is it that from time to time courts seemingly betray their own Thayerian dogmas and allow the trier of fact to determine whether the presumption has been rebutted? Illustrative of this deviation from the avowed norm is *Minter v. Irwin*,³ in which the Supreme Judicial Court of Massachusetts departed from the strict classic posture which it has maintained since a series of brilliant opinions by Judge Henry T. Lummus firmly established the doctrine in that state's *corpus juris*.⁴

Reduced to its simplest terms, *Minter* involved a testator who went to his lawyer, a cousin, in order to have his will made out. The will was duly executed in 1936, but in two copies, the second copy being a carbon but otherwise identical in all respects with the original. Apparently the testator retained the original, leaving the carbon-copy with his cousin. The lawyer died in 1939, testator in 1951. Upon testator's death, however, the original will was not to be found among

2. MODEL CODE OF EVIDENCE rule 704 (1942) expresses the Thayer theory:

"(1) Subject to Rule 703, when the basic fact of a presumption has been established in an action, the existence of the presumed fact must be assumed unless and until evidence has been introduced which would support a finding of its non-existence or the basic fact of an inconsistent presumption has been established.

(2) Subject to Rule 703, when the basic fact of a presumption has been established in an action and evidence has been introduced which would support a finding of the non-existence of the presumed fact or the basic fact of an inconsistent presumption has been established, the existence or non-existence of the presumed fact is to be determined exactly as if no presumption had ever been applicable in the action."

The problem of conflicting presumptions cancelling out each other can be set aside for the purpose of this article. But see Roberts, *Introduction to the Study of Presumptions*, 4 VILL. L. REV. 475, 479-82 (1959). The best example of classic doctrine perhaps is *McIver v. Schwartz*, 50 R.I. 68, 145 Atl. 101 (1929).

See also: MORGAN, 1 BASIC PROBLEMS OF EVIDENCE 33-34 (2d ed. 1957); THAYER, TREATISE 339 (1898); 9 WIGMORE, EVIDENCE § 2487 (3d ed. 1940); Cleary, *Presuming and Pleading: An Essay in Juristic Immaturity*, 12 STAN. L. REV. 5, 16-19 (1959); Falknor, *Notes on Presumptions*, 15 WASH. L. REV. 71, 74 (1940); Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 209-10 (1953).

3. 331 Mass. 8, 116 N.E.2d 567 (1954).

4. E.g., *Epstein v. Boston Housing Authority*, 317 Mass. 297, 58 N.E.2d 135 (1944); *Brown v. Henderson*, 285 Mass. 192, 189 N.E. 41 (1934) (concurring opinion). See *Hobart-Farrel Plumbing & Heating Co. v. Klayman*, 302 Mass. 508, 19 N.E.2d 805 (1939). Judge Lumus was a member of the ALI Committee on Evidence that participated in the preparation of the Model Code. ALI MODEL CODE OF EVIDENCE iii (1942). See also e.g., ALI PROCEEDINGS 214 (1941).

his possessions. Litigation was initiated when the legatees under the will presented the carbon-copy for probate. The next of kin, naturally enough, contested the probate of the copy on the ground that the disappearance of the original indicated that the will had been revoked.

Petitioners, of course, had the burden of proving the identity and due execution of the will.⁵ The burden of proving revocation fell upon the next of kin, but their onus on this issue was considerably lightened by the presence of a presumption of revocation arising from the fact that the original will in possession of the testator could not be found.⁶ In order to rebut the presumption, therefore, petitioners introduced evidence that during the fifteen-year interval between the execution of the will and testator's death, petitioners and testator had continued to enjoy the same friendly relations. Respondents countered with testimony that the circumstances had changed during this interval and that testator had come to rely upon the next of kin. At the close of evidence the probate judge ruled that the presumption of revocation had not been rebutted, and an appeal was taken.

The Supreme Judicial Court adopted the position that destruction of the original will, or the presumption of revocation of the original arising from its absence, would be controlling even though a duplicate was found in good order in the hands of another. The case turned, therefore, on the presumption of revocation and the question whether it had been rebutted. At this point, however, the court affirmed the findings of the probate judge, but in so doing rendered articulate a very non-Thayerian view of presumptions: "Whether the presumption is overcome in a given case presents a question of fact. *Aldrich v. Aldrich*, 215 Mass. 170, 102 N.E. 487."⁷ The court did not extrapolate on its assertion, thereby leaving to the commentator the task of solving the inherent enigma.⁸ Upon close reading, however, the factual context present in the case does yield a hint tending toward the solution of this problem. In illustrating the operation of the classic presumption, the evidence in rebuttal is usually testimonial evidence directly contradicting the presumed fact.⁹ In *Minitier*, however, the presumed fact of revocation was never directly contradicted. Indeed, it could

5. *Hogan v. Whittemore*, 278 Mass. 573, 180 N.E. 526 (1932).

6. That the burden of proving revocation was on the next of kin, see *First Nat. Bank v. Briggs*, 329 Mass. 320, 108 N.E.2d 548 (1952); *Worcester Bank v. Ellis*, 292 Mass. 88, 197 N.E. 637 (1935).

7. 331 Mass. 8, 116 N.E.2d 567, 568 (1954).

8. It may very well be that no presumption is involved here at all; rather, the court merely placed the burden of persuasion on the issue of revocation upon the legatees. See Roberts, *Introduction to the Study of Presumptions*, 4 VILL. L. REV. 475, 488 (1959).

9. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 5 STAN. L. REV. 5, 19 (1959); Roberts, *Introduction to the Study of Presumptions*, 4 VILL. L. REV. 1, 15-20 (1958).

not have been, absent the discovery of the original document or testimony by a witness present when the original had been accidentally destroyed. Rather, a social relationship was testified to, which, if believed, would then serve as the basis from which to infer that the will had not been revoked.

One caveat remains to be noted relative to the *Miniter* case involving the precise point whether or not a true presumption of revocation arising from a lost will exists in Massachusetts. The decision in *Aldrich v. Aldrich*,¹⁰ upon which the court relied, held that the absence of a will known to have been in the possession of testator gave rise to a "presumption of fact" that it had been revoked. *Aldrich*, however, was decided before Judge Lummus contributed so heavily toward the clear exposition of presumptions in Massachusetts law.¹¹ Again, the fact that today there is a clear cut distinction between "presumption of fact" and "presumption of law," the terms "inference" and "presumption" having replaced the older terminology, is now common knowledge.¹² It would appear therefore, that by using the term "presumption" the court had in mind but one thing, namely, presumption of law.¹³

C. *The Corollary:*

Miniter v. Irwin, therefore, can be diagrammed as follows: The proponent of revocation came forward with evidence of the basic fact, *A*, which, if believed, would necessitate a finding of the presumed fact of revocation, *B*, because of the presence of a rebuttable presumption of law. Rather than come forward with testimonial evidence contradicting the presumed fact directly, the opponent proffered evidence of yet another proposition, *C*, that is, of a continued social relationship.

10. 215 Mass. 164, 102 N.E. 487 (1913).

11. See note 4 *supra*.

12. MORGAN, 1 BASIC PROBLEMS OF EVIDENCE 30 (2d ed. 1957): "If the court means that when *A* is established in the action, the existence of *B* may be deduced by the operation of the ordinary rules of reasoning, it sometimes says that the trier of fact may presume the existence of *B* if it finds *A*. The presumption is said to be one of fact, and careful judges and writers insist that the proper term is 'inference' rather than 'presumption.'" ACCORD, 9 WIGMORE, EVIDENCE § 2491 (3d ed. 1940).

13. The 1940 edition of Wigmore's magnum opus contains a section dealing with this kind of presumption in which the author asserts: "The revocation of a will by destruction may be inferred, on a principle of relevancy, already considered, from the fact that it once existed but cannot be found at the testator's death. Whether this circumstance, with or without others, should create a presumption . . . has been much debated." 9 WIGMORE, EVIDENCE § 2523(b) (3d ed. 1940). Massachusetts was notably absent from the footnotes collected under this section. In the 1957 Supplement to the same work, however, Massachusetts is represented by *Miniter v. Irwin* and is listed under the presumption states. ACCORD, 3 A.L.R.2d 953, n.3 (1949).

If believed, *C* would afford a proper basis for an inference contradicting the presumed fact; it would support the opposite conclusion *i.e.*, that the will had not been revoked. Until *C* was established, however, the opponent had not produced enough *direct* evidence contra the presumed fact, *B*, to support a finding of its non-existence. It is in this precise instance that the McDermott Corollary directs that the issue of *C*'s existence must be sent to the trier of fact and that the presumption remains a factor in the case until the trier of fact determines that *C* more probably than not is true.

Thus it is that Professor McDermott¹⁴ would modify the Model Code in order to take into account this unique situation. In his view the presumption provision should read something like the following:

When the basic fact of a presumption has been established in an action and evidence has been introduced directly contradicting the presumed fact and which would support a finding of the non-existence of the presumed fact, the existence or non-existence of the presumed fact is to be determined exactly as if no presumption had ever been applicable in the action.

But when the basic fact of a presumption has been established in an action and evidence has been introduced of a third fact which would support an inference converse to the presumed fact, the party asserting the non-existence of the presumed fact has the burden of persuading the trier of fact that the existence of the third fact is more probable than its non-existence.

D. *Application of the corollary.*

It is interesting to observe that the corollary provides an excellent rationalization of *Minter v. Irwin* within the conceptual framework of classic practice. Whether it will serve adequately to explain each and every deviation from the norm in Thayer states remains to be seen. The application of the theory to several recently decided cases, however, does afford some appreciation of its utility.

Returning for the moment to Massachusetts, *Casagrande v. F. W. Woolworth*¹⁵ provides an interesting vehicle for testing the theory. Plaintiff had purchased a jar of a nationally known deodorant in one of defendant's stores and the application of the product to plaintiff's person had caused harm. Plaintiff brought an action against the retailer on the basis of a warranty of merchantability and the case came to hinge on the precise issue whether the product was fit for use by normal persons.¹⁶ Plaintiff testified that she had used the same

14. Dean of Suffolk University School of Law, Boston, Massachusetts.

15. 165 N.E.2d 109 (Mass. 1960).

16. *Id.* at 111: "Fitness for use by a normal person is a test often stated."

product without harm for twenty years and that she had had no history of skin trouble of any nature. The dermatologist who had treated her after the injury testified that while the product did not contain any impurities, continued use of the product for a long period could "sensitize" the skin so that the user could become allergic to it. Another dermatologist added that there was no limit to the number of articles which after continued use could sensitize the user. The defense in turn produced the chemist in charge of the manufacturer's quality control who testified that the contents of the jar returned by plaintiff had been made according to formula and that the formula contained "no foreign matter of an irritating nature."¹⁷ In addition, a doctor, in charge of clinical testing of the product in order to maintain safety standards testified that the product did not contain any ingredients which could have a directly irritating effect on the skin; indeed, "not more than one person in two thousand would even show a sensitive reaction."¹⁸ Moreover, for a person to become sensitized over a period of time to continued use of the product would be an exception to the general rule, although it would be quite possible. On this evidence it was held that a directed verdict was correctly entered for defendant.

It is interesting to observe that plaintiff's case rested upon an inference drawn in part, at least, from a presumed fact. That is, she had introduced testimonial evidence that she had been sensitized by the product, Fact *A*. The court reasoned that she was the beneficiary of a presumption of normalcy, Presumed Fact *B*. Thus, from *A* and *B*, it could be inferred that the product would sensitize normal persons, the ultimate issue, *C*.¹⁹ If this is correct, it is at once obvious that the evidence of defendant did not directly contradict the presumed fact, *B*, i.e., plaintiff's normalcy, but instead contradicted the ultimate fact, *C*, whether the product would sensitize normal persons in general. Only inferentially, therefore, did defendant's evidence rebut the presumed fact. It follows that, according to the McDermott Corollary, the court should have followed its practice in *Minter v. Irwin* and remanded the case for submission to the trier of fact, the presumption to stand until defendant persuaded the trier that the product would not sensitize normal persons.

17. *Id.* at 110-11.

18. *Id.* at 111.

19. *Id.* at 111-12: "Had there been no evidence on the issue of sensitivity of the plaintiff's skin, other than the irritation complained of would have been aided by the 'assumption that a human being is . . . normal'. . . . From this, and from the harm done, it could have been inferred that the product was a sensitizer, unmerchandise if sold without a suitable warning. . . . Any presumption of normality disappeared in the light of the evidence which tended to show that the deodorant and its components were not *significant* irritants." (Emphasis added.)

While several other of the New England states have ample case law dealing with presumptions,²⁰ the Supreme Judicial Court of Maine has never, in its own words, "found it necessary to contribute any extended academic discussion to the plethora of words which have been written on this controversial subject."²¹ When that court did finally render articulate its position, however, the result was quite revealing.

The facts giving rise to the Maine decision in *Hinds v. John Hancock Mut. Life Ins. Co.*²² are not unusual. Plaintiff sued to recover on a policy of life insurance which contained a double indemnity provision in the event that the insured met death due to bodily injuries sustained solely through violent, external and accidental means. As to the double indemnity feature of the policy, therefore, plaintiff was the proponent of the proposition that the insured had met his death by accident. The evidence adduced by plaintiff in support of this proposition has been expertly summarized by the court:

At the outset it was stipulated that an analysis of the blood of the decedent, Donald Hinds, made shortly after his death, disclosed an alcoholic content of .267% by weight. During the presentation of the plaintiff's case, it was shown by competent medical and other testimony that the assured was found slumped unconscious in a chair at his kitchen table late in the evening; that he was removed to a hospital and died there without regaining consciousness; that the cause of death was a gunshot wound inflicted by a revolver fired while in contact with the skin in the region of the right temple; that the bullet pursued approximately a horizontal course through the head from the right to the left; that decedent was a "big man" over six feet tall and weighing about 200 pounds; that he was fifty years old and apparently in good health; that on a table at his right side were a revolver and an opened package of bullets; that there were present no cloths or other gun cleaning paraphernalia; that there were no outward or visible signs of any violent scuffle, quarrel or other disturbance on the premises; and that there were empty whiskey bottles near the decedent's body. The family physician, first to arrive at the scene, found Emily Hinds holding her husband's head. He described her as appearing confused and in a state of shock. Social and business friends gave testimony tending to negative any apparent motive for suicide. A medical expert stated that one in the decedent's state of intoxication would be confused, with his reactions markedly slow and his pain sensation diminished; that

20. *E.g.*, *O'Dea v. Amodeo*, 118 Conn. 58, 170 Atl. 486 (1934); *Jodoin v. Baroody*, 95 N.H. 154, 59 A.2d 343 (1948); *Hill v. Cabral*, 62 R.I. 11, 2 A.2d 482 (1938); *Tyrell v. Prudential Ins. Co.*, 109 Vt. 6, 192 Atl. 184 (1937).

21. *Hinds v. John Hancock Mut. Life Ins. Co.*, 155 A.2d 721 (Me. 1959).

22. *Ibid.*

he would be unable to think clearly but would not be unconscious and would be able to "navigate" although not very steadily. Not one of the witnesses had ever before seen the decedent in this stage of intoxication. Emily Hinds, although inferentially an eye witness to the tragedy, was not called by the plaintiff.²³

In rebuttal, the case for the defense was concise:

The witness first called in defense was Emily Hinds. At the very beginning of her examination, she was asked if she was the widow of Donald Joseph Hinds. She then replied, "I refuse to testify, on the advice of counsel, on my constitutional right that it might tend to incriminate me." (Emphasis supplied.) She was then asked, "Do you consider that you would be incriminated by being the wife of Donald Joseph Hinds?" At this point the jury was ordered to retire and colloquy then ensued which resulted in a ruling by the presiding justice that the pending question and all further questions of this witness were excluded because of her claim of privilege. Defendant's counsel took no exception nor did he pursue the matter further with this witness. He next called a police officer who had investigated the death on the evening of its occurrence. This witness identified the gun which he had observed on the kitchen table as being a 22 caliber automatic pistol, designed to fire long rifle bullets. He testified that the broken box of ammunition scattered about the table contained short rifle bullets. The full box originally contained 50 cartridges, all of which were accounted for. The officer counted 47 cartridges on the table and found three in the gun, one of which had been fired. He further noted what appeared to be a few business papers scattered on the table. He noted the presence on the floor beside the table of two empty bottles, each designed to contain a fifth of a gallon of whiskey.²⁴

The Supreme Judicial Court reasoned that the evidence introduced in plaintiff's part of the case would not, by itself, support a finding of accidental death. It did, however, give rise to presumption that death had been accidental, so that the burden of going forward with evidence on the issue of suicide was placed upon defendant, if the presumption against suicide was going to be cancelled out as a factor in the case. The court, however, did not adopt the Thayer view as to when and how a presumption is rebutted. Rather, whether a presumption is rebutted, ruled the court, is a *question of fact*.

Unlike *Miniter*, however, the court in *Hinds* renders articulate its reasoning for this conclusion. It stated flatly, on the one hand, that the burden of persuasion, once fixed, never shifts, thus ruling out the

23. *Id.* at 724.

24. *Id.* at 724-25.

adoption of the view that a presumption shifts that burden. But, on the other hand, it adopted Professor Morgan's thesis²⁵ that it is pointless to create a presumption "only to allow it to vanish in the face of evidence of dubious weight and credibility."²⁶ Having set up a thesis and an antithesis, the court then announced its synthesis to be:

. . . that a disputable presumption persists until the contrary evidence persuades the factfinder that the balance of probabilities is in equilibrium, or, stated otherwise, until the evidence satisfies the jury or factfinder that it is as probable that the presumed fact does not exist as that it does exist.²⁷

This rule, however, as announced by the court, was made subject to two corollaries. First, if the opponent does not produce any, or produces merely a scintilla of evidence contra the presumed fact, then the court must instruct the trier of fact that the presumption stands as a matter of law. Second, if the opponent produces evidence contra the presumed fact which no reasonable trier could reject, then the court must rule as a matter of law that the presumption is dissolved. Indeed, in the instant case, the court reasoned that the evidence of suicide was so clear that the double indemnity aspects of the case should not have been sent to the jury by the trial judge and reversed accordingly.

Behind the announced reasoning of the Maine court to support the idea that it is a question of fact whether a presumption is rebutted, the facts of the case are again worthy of note. Once again, as in *Miniter*, there was no direct evidence available with which to rebut the presumed fact, the only witness claiming privilege. Instead, there could be no evidence contra the presumed fact until the inference was drawn from other facts, and, of course, that inference could not be drawn until those other facts were established in the action. Unlike *Miniter*, however, the proof was so clear that the facts could be established as a matter of law by the court and did not have to be fixed by the trier of fact.

25. Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 82 (1933); Morgan and Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 913 (1937). The consensus of these critics is simply that it is pointless to create a presumption only to allow it to vanish in the face of evidence of dubious weight and credibility. See also Bohlen, *Effect of Rebuttable Presumptions upon the Burden of Proof*, 68 U. PA. L. REV. 307 (1920).

26. 155 A.2d 721, 731 (1959).

27. *Id.* at 730. This, of course, is Professor Morgan's compromise position that he advocated after the American Law Institute rejected his proposal of incorporating the Pennsylvania Rule into the Model Code. Morgan, *Some Observations Concerning A Model Code of Evidence*, 89 U. PA. L. REV. 145, 162-63 (1940). The court in its opinion relied heavily upon the same ideas expressed in Morgan's article, *Presumptions and Burden of Proof*, 47 HARV. L. REV. 59 (1933). See also Roberts, *Introduction to the Study of Presumptions*, 4 VILL. L. REV. 1, 29-33 (1958).

It will be seen, therefore, that the court thought that the question whether the presumption had been rebutted was one of fact and not of law. It believed, moreover, that in order to arrive at this result it had to repudiate the Thayer doctrine and adopt a rule not totally dissimilar to the Pennsylvania rule whereby the presumption shifts the risk of non-persuasion to defendant on the issue of the presumed fact.²⁸ According to the McDermott Corollary the same result would have been justified under Thayer practice on these particular facts because again the presumption was not *directly* rebutted. This is so because it would have been indirectly rebutted only if and when the circumstantial facts surrounding the event were established which would afford the basis for an inference contradicting the presumed fact of accident, and the onus was on defendant to establish them.

The *Hinds* case, therefore, is similar to the recent Pennsylvania trend away from the so-called Pennsylvania rule.²⁹ But even in its heyday when it was being considered by the American Law Institute, the authority for the Pennsylvania rule had been thrown into some doubt by an opinion from the supreme court of that state which seemed to incorporate the Thayer theory wholesale, albeit only as dicta.³⁰ In 1944, however, the Supreme Court of Pennsylvania seemed actually to have adopted a near-Thayer position in *MacDonald, Adm'rx v. Pennsylvania R.R.*³¹

For years Pennsylvania had treated the procedural consequences of *res ipsa loquitur* as a presumption which shifted to defendant the burden of persuasion on the issue of negligence. In *MacDonald*, however, a child was killed while a passenger on an ill-fated train which left the rails. The parents initiated a wrongful death action against the railway and relied upon the usual presumption on the issue of the railway's negligence. In turn, the defendant introduced testimony as to facts which would warrant an inference that the derailment had been caused by sabotage. On appeal the court held that the presumption did not shift to defendant the burden of persuasion, citing

28. Whether the presumption shifts to defendant the risk of non-persuasion proper, or merely the onus to establish an equilibrium on the issue of the presumed fact probably is academic except as a detour around the implications of *Tot v. United States*, 319 U.S. 463 (1943). See Levin, *Pennsylvania and the Uniform Rules of Evidence: Presumptions and Dead Man Statutes*, 103 U. PA. L. REV. 1, 20 (1954): "In most cases, having cleared the hurdle of getting to the jury, litigants will not be affected by the refinements. . . ." But see Roberts, *Introduction to the Study of Presumptions*, 4 VILL. L. REV. 1, 26 (1958).

29. *Waters v. New Amsterdam Cas. Co.*, 393 Pa. 247, 144 A.2d 354 (1958).

30. *Watkins v. Prudential Life Ins. Co.*, 315 Pa. 497, 173 Atl. 644 (1934). The actual holding of the case was that there is no presumption against suicide, but otherwise the opinion is a compendium of Thayerian doctrine, replete even with excerpts from his Storrs Lectures of 1896 at Yale.

31. 348 Pa. 558, 36 A.2d 492 (1944).

Thayer's axiom that once fixed that burden never shifts.³² However, because the identity of defendant's exhibits and, in fact, its entire case, rested on oral testimony, the court held that it was a question for the trier of fact whether or not the presumption had been rebutted.

Thus, once again, the question whether the presumption had been rebutted was held to be one of fact. Yet in *Casagrande*, *Minitier*, *Hinds*, and now *MacDonald*, each court accepted the postulate that the burden of persuasion never shifts. Once again in *MacDonald*, as in the preceding three cases, the evidence by way of rebuttal did not directly contradict the presumed fact. Rather than introduce evidence that it had maintained the appropriate standard of care, the railroad introduced evidence which, if believed, indicated sabotage, in which event *the inference* naturally would follow that it had not been negligent. The decision, therefore, was a correct application of the Thayer doctrine, *if* the McDermott Corollary is added to the standard Thayer canon.³³

E. *Evaluation of the corollary.*

Granting the proposition that a presumption exists as an evidentiary device which shifts to the opponent the burden of coming forward with evidence in the first instance upon the issue of the presumed fact, and that the device disappears from the case as a matter of law when the opponent does come forward with enough evidence to support a finding of the presumed fact's non-existence, the corollary is a brilliant explanation of the reasons underlying innumerable deviations from the Thayer norm. Granting the "pure" theory of presumptions, that is, affirming the utility of the Thayer device, the real obstacle to complete acceptance of the corollary as an explanation of these deviations from the Thayer norm is that this explanation assumes too much. That is, it inferentially postulates that the courts admit (or ought to admit) that the presumption device is a static evidentiary mechanism within the domain of an abstract, conceptualized set of fixed rules called "adjective law," which in turn is an existentially meaningful *corpus juris* divorced from "substantive law."

32. *Id.* at 564-65, 36 A.2d at 495-96.

33. The decision in the MacDonald Case, coupled with *Watkins*, cited in note 31 *supra*, casts considerable doubt on the state of the law in Pennsylvania, the court having rendered articulate classic Thayer prose while sending the case to the trier of fact on what appeared to be modified application of standard Pennsylvania practice. See, e.g., Morgan, *The Law of Evidence, 1941-1945*, 59 HARV. L. REV. 481, 500 (1946): "[T]here is much doubt as to the exact total effect of a presumption in Pennsylvania." Compare *Waters, v. New Amsterdam Cas. Co.*, 393 Pa. 247, 144 A.2d 354 (1958); *Smith v. Hennessey*, 11 Pa. D. & C.2d 354 (C.P. Phila. 1957).

Both *Minitter* and *MacDonald*, perhaps, can be explained with the application of the corollary. In both these cases, however, the courts were willing to resolve the factual dispute according to the matrix of rules of proof production and allocation of the risk of non-persuasion in which the parties found themselves enmeshed. Indeed, these cases were resolved by the application of neutral principles of law, that is, by leaving the resolution of the fact question to be decided in the chance posture in which the parties found themselves relative to the risk of non-persuasion. It is submitted, however, that both *Hinds* and *Casagrande* are entirely different situations in which the courts were not satisfied to allow the conflict to be resolved by the accidental posture in which the question of fact was presented to the trier of fact.

Properly understood *Hinds* is not a presumption case at all but a substantive decision on the law of insurance. Literally reading the policy, the plaintiff had the burden of pleading (1) the violent death of the insured and (2) that this death was accidental. In fact the case was tried, after the application of the presumption device, on implicit pleadings which saw plaintiff not only carrying the burden of pleading and proving violent death but also saw defendant silently pleading and proving that death was attributable to suicide. The result is really a modification of the principles of insurance law whereunder the court held that regardless of the terms of the insurance contract the insurer ought to carry the risk of suicide unless it could illustrate to the court that suicide was manifest.

The interrelation of substantive law and the use of the language of presumptions is even clearer in *Casagrande*. Plaintiff's case hinged upon the fact that she was injured by a product and a presumption that she was normal, both of which taken together supported an inference that the product would harm normal persons. Defendant countered with evidence that the manufacturer maintained both a system of quality control and medical tests in order to anticipate and thereby prevent harm. The case was disposed of on the ground that defendant's evidence would support a finding that plaintiff was not a normal person, but the fact remains that the evidence did not directly establish plaintiff was not normal but merely established a fact from which it could be inferred that she was not. According to the strict law of presumptions the opinion is wrong, *if it was an adjective law problem*. The fact is that the opinion is correct if read in terms of sales law.

What the court actually did in *Casagrande* was to render articulate in procedural language its policy relative to product liability. Thus, a showing that plaintiff was injured by the product would suffice to make

the seller liable on the warranty if the seller did nothing to rebut the charge. This is rationalized in terms of a presumption, but the decision can be translated into substantive law as a principle that the seller of such a product is absolutely liable for harm caused thereby, unless certain extenuating circumstances exist. If, however, the seller can demonstrate to the satisfaction of the court that the manufacturer of the product maintains a system of quality control and medical prophylaxis guarding against harm, then the seller is not liable for plaintiff's harm standing alone. This means nothing more than that in the instance of a deodorant a seller is not liable for isolated harm to a user if the manufacturer maintains an adequate control system. Without a control system, however, the seller is absolutely liable; and even with a control system it is liable if plaintiff can show the system is not working because others have been harmed.

This means, of course, that the presumption is not a real procedural device, but a verbal device used to rationalize a particular body of substantive principles. The same presumption, it is submitted, would not have been rebutted had the product been lipstick or eye drops, because the seller would have been absolutely liable for harm in these instances. It follows that the presumption only masks policy where the court is really engaged in regulating the safety practices of manufacturers of certain commodities, through fixing liability on their outlets.

II.

HISTORY OF AN IDEA.

A. *Ohio as the source of presumption doctrine:*

The *Hinds* case is also interesting because it promulgates a doctrine of presumptions midway between the Thayer and Pennsylvania views. Thus,

. . . a disputable presumption persists until the contrary evidence persuades the factfinder that the balance of probabilities is in equilibrium, or, stated otherwise, until the evidence satisfies the jury or factfinder that it is as probable that the presumed fact does not exist as that it does exist.³⁴

For authority the court relies almost exclusively upon an article by Professor Edmund Morgan which appeared some years ago.³⁵ The

34. 155 Me. 349, 155 A.2d 721, 730 (1959).

35. Morgan, *Instructing the Jury on Presumptions and the Burden of Proof*, 47 HARV. L. REV. 59 (1933).

tenor of that article was an extremely articulate brief in behalf of the Pennsylvania rule, but which included an offer of compromise. Thus the author proposed:

It is conceded that practical difficulties prevent the adoption of a rule which makes the duration of the presumption depend upon belief . . . and if the choice were between that rule and a rule which makes it disappear upon the mere introduction of evidence, the latter might be preferred. . . . It is, therefore, entirely reasonable to insist that where a presumption is created to compel the disclosure of the facts by the litigant to whom the evidence of them is peculiarly accessible, it should not be destroyed until the evidence persuades the jury at least that the non-existence of the presumed fact is as probable as its existence.³⁶

To this suggestion, the Maine court simply said, "We agree. . . ."³⁷

It is interesting to observe, however, that Professor Morgan's authority for this view has consistently been two cases in Ohio.³⁸ In this instance, at least, as Ohio goes, so goes Maine. The question research-wise narrows itself to whence Ohio derived its rule. The answer turns out to be Massachusetts. Thus, in giving fullest expression to the rule, the Ohio court asserted: "Perhaps one of the best statements to be found of the rule now under consideration, is that given by Chief Justice Shaw in *Powers v. Russell*, 13 Pick. (Mass.) 76, . . ."³⁹ The solution, therefore, remains to be found in an examination of this ancient case.

B. *An Exercise in Semantics:*

The Supreme Judicial Court of Massachusetts has prided itself that, "The distinction between the burden of proof and the burden of going forward with evidence has long been recognized by this

36. *Id.* at 80-81.

37. 155 Me. 349, 155 A.2d 721, 730 (1959).

38. *Tresise v. Ashdown*, 118 Ohio St. 307, 160 N.E. 898 (1928); *Klunk v. Hocking Valley Ry. Co.*, 74 Ohio St. 125, 77 N.E. 752 (1906). See MORGAN, 1 BASIC PROBLEMS OF EVIDENCE 35 n.24 (2d ed. 1957); Morgan, *How to Approach Burden of Proof and Presumptions*, 25 ROCKY MT. L. REV. 34, 46 n.24 (1952); Morgan, *supra* note 35 at 61 n.6 (1933). See Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 225 (1953): "It has generally been considered that in the state of Ohio the jury determines whether or not the persuasive effect of a presumption has been equally balanced by rebutting evidence." In this same article, however, Professor Laughlin took the position that Ohio was about to return to the application of pure Thayer theory, relying upon *Brunny v. Prudential Ins. Co.*, 151 Ohio St. 86, 84 N.E.2d 504 (1949). But see *Carson v. Metropolitan Life Ins. Co.*, 165 Ohio St. 238, 93 N.E.2d 717 (1950), where the court limited *Brunny* to situations where the evidence in rebuttal is so overwhelming as to leave no question of fact open for the trier of fact.

39. *Klunk v. Hocking Valley Ry.*, 74 Ohio St. 125, 135, 77 N.E. 752, 754 (1906).

court. *Powers v. Russell*, 13 Pick. 69, 76. . . ."⁴⁰ Thus it was in *Powers v. Russell* that the dichotomy was rendered articulate, and since that time Massachusetts has sought to limit "burden of proof" to mean only the "risk of non-persuasion."⁴¹

This position was roundly reaffirmed shortly after *Powers* in *Central Bridge Co. v. Butler*:

The burden of proof and the weight of the evidence are two very different things. The former remains on the party affirming a fact in support of his case; . . . the latter shifts from side to side in the progress of a trial, according to the nature and strength of the proofs offered in support or denial of the main fact to be established.⁴²

This much is readily understood and followed today. The real difficulty lies in that Chief Justice Shaw in his opinion in *Powers* did *not* draw quite so clear a distinction and the question as to exactly what the chief justice meant merits critical investigation.

The *Powers* case involved both the allocation of the several burdens of proof and the effect of presumptions. The facts, however, remain relatively elementary, the case having involved a bill in equity brought to redeem a parcel of real estate. Plaintiff's brother had some years before received a conveyance of the land in question from defendant, the brother then having executed back to his grantor a mortgage deed conditioned on a bond wherein the brother promised to support his grantor in the manner to which the latter had become accustomed. It was plaintiff's contention, however, that his brother had immediately executed a second mortgage deed to him, in virtue of which plaintiff now claimed a right of redemption against his brother's grantor. In order to recover, plaintiff had to show that he stood in the shoes of his brother vis à vis the original grantor. His case, therefore, came to hinge upon his ability to prove the execution and delivery of the second mortgage deed. The difficulty, however, was that not only was the brother dead, but plaintiff had lost his deed. The simple result of the case was that plaintiff lost the case because he could not prove delivery of the deed. The significance of the case, however, lies in that the Chief Justice chose to use the opinion in the case as a vehicle by which to render articulate the court's position on the burden of proof problem.

40. Lummis J., In *Epstein v. Boston Housing Authority*, 317 Mass. 297, 58 N.E.2d 135, 139 (1944).

41. THAYER, *TREATISE* 355, 387 n.1 (1898).

42. 68 Mass. (2 Gray) 130, 132 (1854).

The Chief Justice began by discussing *what might have developed* in the trial of the instant case.

But supposing that the affidavit of the plaintiff was sufficient, and the evidence from the production of an office copy, without further proof, would have been prima facie evidence of execution, it would have resulted from the presumption of law, arising from the common attestation of the witnesses, in their certificate, that it was signed, sealed *and delivered*. . . .

In the supposed state of proof, therefore, a delivery would have been presumed from the attestation, and this presumption would not be rebutted from the fact, that the deed was not in the possession of the grantee. . . .

But when the original deed was produced, and shown to have been in the custody of the grantor at the time, the presumption . . . was rebutted. . . . Then the deed stood as it would have done, if the original deed had been produced in the outset by the plaintiff, he having the burden of proof of an execution and delivery.⁴³

This much of the opinion at least is clear.

But Shaw, C.J., did not stop there. The very next paragraph is the *crucial* one.

It may be useful to say a word upon the subject of the burden of proof. It was stated here, that the plaintiff had made out a prima facie case, and, therefore, the burden of proof was shifted and placed upon the defendant. In a certain sense this is true. Where the party having the burden of proof establishes a prima facie case, and no proof to the contrary is offered, he will prevail. Therefore the other party, if he would avoid the effect of such prima facie case, must produce evidence, of equal or greater weight, to balance and control it, or he will fail. Still the proof upon both sides applies to the affirmative or negative of one and the same issue, or proposition of fact; and the party whose case requires the proof of that fact, has all along the burden of proof. It does not shift, though the weight in either scale may at times preponderate.⁴⁴

This is the exact language quoted by the Ohio courts to sustain their view of presumptions.⁴⁵ If Shaw was discussing presumptions per se, then the Ohio rule is, in effect, a verbatim copy of the original Massachusetts practice. The question remains, however, as to what the Chief Justice meant by this most interesting exposition.

43. 30 Mass. (13 Pick.) 69, 75-76 (1839).

44. *Id.* at 76.

45. Klunk v. Hocking Valley Ry., 74 Ohio St. 125, 129, 77 N.E. 752, 754 (1906).

The courts of Massachusetts have always assumed that this particular passage dealt *only* with the burden of proof and marked the first clear-cut distinction between the burden of persuasion and the burden of merely going forward with the evidence.⁴⁶ It is interesting to observe, moreover, that while Thayer dealt with the *Powers* case several times in his treatise, it was always on the assumption that in this paragraph the Chief Justice was discussing distinction and not presumptions.⁴⁷ It would seem that the Ohio court assumed that because the Chief Justice used the term "prima facie case" that the paragraph dealt with presumptions and was merely a continuation of the extrapolation which had started with presumptions. In this regard it must be observed that Wigmore warned as recently as 1940 that some courts still use "prima facie" when they mean presumption, even though the term has come to mean merely a case sufficient to justify the court in allowing the proponent of it to reach the trier of fact.⁴⁸

Language being conventional, the real question is not what was understood by "prima facie" in Wigmore's 1940 edition, or by the Ohio court in 1906, but what Chief Justice Shaw meant in 1832. It is submitted that Shaw intended by these words only to render articulate the functioning of the burden of proof and had no intention of promulgating a rule for presumptions. Rather, by "prima facie case" Shaw meant a case where plaintiff had satisfied the burden of persuasion as well as the burden of production, so that, if he was not to lose the case, the burden of going forward to equalize the situation had indeed shifted to the defendant.

The English usage in the nineteenth century certainly supports this contention. Thus, the Master of the Rolls in 1883 made this quite clear:

It seems to me that the proposition ought to be stated thus: the plaintiff may give *prima facie* evidence which unless it be answered, either by contradictory evidence or by the evidence of additional facts, *ought to lead the jury* to find the question in his favor. . . .⁴⁹

Indeed, Professor McCormick in discussing the possibility that plaintiff may be entitled to a directed verdict in the event that defendant does not come forward to rebut a conclusive case illustrates his point with a quotation which uses similar language.

Such a ruling means that in the judge's view the proponent has not merely offered evidence from which reasonable men could

46. See cases collected in opinion of Lummis J., cited note 41, *supra*.

47. THAYER, TREATISE 355, 379, 387 (1898).

48. 9 WIGMORE, EVIDENCE § 2494 (3d ed. 1940).

49. *Abrath v. N.E. Ry.*, [1883] 11 Q.B.D. 440, 456.

draw the inference of the truth of the fact alleged, but evidence from which (in the absence of the evidence from the adversary) reasonable men could not help but draw this inference. Thus, Lord Mansfield, In Rex. v. Almon, told the jury that upon the issue whether defendant has published a libel, proof of the sale of the book in defendant's shop was, being unrebutted, "conclusive," and Nash, J., in State v. Floyd, said: "Prima Facie evidence is a rebuttable presumption of law, and if not rebutted, the jury is bound in law to find their verdict in accordance with it, and if they refuse to do so, they violate their duty."⁵⁰

It follows that in older cases the word "presumption" included in a discussion of the burden of proof means, not the device presumption as understood by Thayer, but the possibility that the proponent can subject his opponent to an adverse peremptory ruling if the inference from the basic facts of plaintiff's case is irresistible and those basic facts are undisputed and the witnesses who testified to them are unimpeached.

This was also the conventional mode of expression in Massachusetts during the nineteenth century. Thus, in *Central Bridge Corp. v. Butler*,⁵¹ the plaintiff sued to collect tolls and defendant answered by way of the general issue. In discussing the allocation of the burden of proof Justice Bigelow said:

This made out a prima facie case, and *would entitle them to recover* unless the defendant offered some evidence to rebut it. But it does not follow that the burden of proof was thereby shifted. . . . The burden of proof and the weight of evidence are two very different things. The former remains in the party affirming a fact in support of this case, and does not change in any aspect of the cause; the latter shifts from side to side. . . .⁵²

It would seem, therefore, that the authority for the proposition that it is a question for the trier of fact whether a presumption has been rebutted, and that the trier must find it to have been rebutted when the opponent's evidence equalizes or balances it, derives from a semantic shift in meaning. Historically, at least, this view is a conceptual mutation. This, however, is not to deny that it may nonetheless appear attractive to opponents of the Thayer "bursting bubble" theory of presumption.

50. McCORMICK, EVIDENCE 637-38 (1954).

51. 68 Mass. (2 Gray) 130 (1854).

52. *Id.* at 131-32.

C. *The significance of history.*

That the view espoused in *Hinds* is possibly rooted in an old misunderstanding hardly invalidates the rule announced therein. Indeed, the real test of validity is never one of lineage but a pragmatic one: does the device work? The answer to this inquiry, however, depends upon the purpose behind the rule. If that purpose was on the particular facts to broaden the coverage of insurers on double indemnity clauses, then that purpose probably has been efficiently effectuated by the rule.⁵³ If the purpose was to regulate the rational conduct of trials by defining the terms employed therein, then the value of the clarification achieved is far outweighed by the addition of yet another element of unrealism into an already irrational process.⁵⁴ That is, to expect the jury to appreciate and to apply in practice the nuance which in reality separates "more probably than not" from "equilibrium" is to enter upon a world of juristic absurdity. The basic purpose of the extended dicta in *Hinds*, however, may have been to adopt a disguised version of the Pennsylvania rule, the "equilibrium" test being adopted as an artifice to avoid possible constitutional objections.⁵⁵ The question then becomes whether, granting a distaste for classic theory, the acquisition of a quasi-Pennsylvania position is worth the added note of unrealism it injects into charges to juries. One can only suspect that an outright adoption of the Pennsylvania approach would have been preferable, a possible constitutional law case being less damaging to the juristic process than the addition of an everyday note of occult mysticism addressed to jurors.

53. *E.g.*, *Byrd v. Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525, 537 (1958): "Concededly the nature of the tribunal which tries issues may be important in the enforcement of the parcel of rights making up a cause of action or defense, and bear significantly upon achievement of uniform enforcement of the right. It may well be that in the instant personal injury case the outcome would be substantially affected by whether the issue of the immunity is decided by judge or a jury. Therefore, were 'outcome' the only consideration a strong case might appear for saying that the federal court should follow the state practice."

54. Michael, *The Basic Rules of Pleading*, 5 RECORD OF N.Y.C.B.A. 175, 199-200 (1950): "But to say that I can decide an issue of fact reasonably either way is to say, I submit, that I cannot, by the exercise of reason, decide the question. That means that the issue which we typically submit to juries is an issue which the jury cannot decide by the exercise of its reason. The decision of an issue of fact in cases of closely balanced probabilities, therefore, must, in the nature of things, be an emotional rather than a rational act; and the rules regulating that state of a trial which we call the state of persuasion, the state when lawyers sum up to a jury, recognize that distinction."

55. See note 28 *supra*.

III.

CONCLUSION.

It is submitted that neither logic nor history affords a solution to the presumption problem. The real difficulty is two-fold. First, there is need to admit that there is no "right" theory of presumptions in so far as the adjective law is concerned. The notion that one or another form of presumption is preferable posits a non-existent monism in which a "pure" theory of law can be predicated. Efforts in that direction in the past are in no small measure due to a two-valued "either/or" logic which still afflicts much of the thinking about adjective law. Taking a probabilistic approach admitting the spectrum of differences of degree into the equation, it is possible to see that *each* form of presumption may be adapted to perform different functional tasks.

The second difficulty occurs when presumptions are dealt with as if they existed separately but equally from the substantive law. It is submitted that only an integrated jurisprudence of presumptions is feasible, that is, the value and function of a presumption must perforce vary with the substantive scene in which it is applied. Its function must not be considered an end in itself, but rather its functioning must be looked at as a means by which the policies immanent in the substantive law are effectuated. Thus, if each presumption were to be evaluated in terms of the result its application achieved in each sector of the substantive law, some test might be evolved by which the effectiveness of a given presumption might be assessed. That test, however, will not be one either of history or of logic, but will involve an inquiry into whether the application of the presumption device effectuates the social purposes of the substantive law regulating the particular conduct involved.